



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-534.

STANLEY G. WELSH ET AL.,
PETITIONERS,

v.

RICHARD L. KINCHLA ET AL.,
RESPONDENTS.

**Brief for the Respondents in Opposition to the Petition
for a Writ of Certiorari to the United States Court of
Appeals for the First Circuit.**

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Opinions Below.

The opinions of the District Court of the District of Massachusetts and the United States Court of Appeals for the First Circuit appear as appendices to the Petition for a Writ of Certiorari.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Statutory Provisions Involved.

The pertinent section of the Civil Rights Act of 1871 (42 U.S.C. § 1983) is set forth in the Petition at pages 2-3.

Questions Presented.

Whether damages are collectible under 42 U.S.C. § 1983 against one who in good faith followed a statutory real estate attachment procedure, which was then valid and presumed constitutional.

Statement of the Case.

On January 2, 1973, individual respondent Richard L. Kinchla instituted a suit in the Barnstable County Superior Court against the petitioners for a real estate broker's commission due on the anticipated sale of a certain parcel of property, owned by the petitioners, known as "Highfield" and located in Falmouth, Mass. On December 2, 1977, the jury sitting at the trial returned a finding for the plaintiff Richard L. Kinchla with damages in the sum of \$175,000.00. On December 15, 1977, judgment entered for the plaintiff broker in the sum of \$175,000 plus interest thereon from February 5, 1973. On February 3, 1978, the petitioners filed a claim of appeal and the record is presently before the Court of Appeals of the Commonwealth of Massachusetts.

When the respondent initiated his action in the Massachusetts Superior Court, he also sought and was granted by the court a real estate attachment of the petitioners' property located in Barnstable County. There is no dispute that the attachment was made in conformance with Massachusetts General Laws c. 223, which detailed the statutory attachment procedure at that time. There is also no dispute that on January 2, 1973, when the respond-

ent instituted his suit and made attachment of the petitioners' property, the Massachusetts real estate attachment statute had been validly enacted and was in full force and effect. Finally, there is no dispute that when the respondent's attorney attached the two petitioners' property, particularly since each maintained a winter residence out of this court's jurisdiction, he acted in accordance with the customary professional standards then in force in Barnstable County.

On August 7, 1973, a three-judge court decided *Bay State Harness Horse Racing and Breeding Association, Inc. v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973). The case held that by reason of its failure to require notice in certain prescribed circumstances, the Massachusetts real estate attachment statute was unconstitutional. The complaint in the case at bar was filed in District Court February 21, 1973. In the wake of the *Bay State* decision, the petitioners moved to establish the invalidity of the attachments. On January 24, 1975, the District Court found the attachment constitutionally deficient and it was dissolved (A. 1a-4a). Thereafter the case was tried on the issue of damages. On October 13, 1977, the respondent's motion for judgment was allowed because "upon the facts and the law, no right to relief has been shown" (A. 7a). The court held further (A. 6a):

"In the instant case there is no issue of fact whatsoever. The simple legal question is whether a cause of action arises under 42 U.S.C.A. § 1983 against a person who follows a state statutory scheme which at some subsequent time is ruled to be unconstitutional. Plaintiffs have cited no case so holding, nor has the court's research discovered any such decision."

An appeal was taken from the District Court's dismissal by the petitioners to the Court of Appeals for the First

Circuit. The Court of Appeals affirmed the judgment of the District Court, again holding that neither the pleadings nor proof in the case at bar showed a right to relief in the form of money damages (A. 8a-11a).

Argument.

I. THE DECISION BELOW INVOLVES A QUESTION OF FEDERAL LAW CONCERNING THE REDRESS AVAILABLE UNDER 42 U.S.C. § 1983 WHICH HAS BEEN CONSISTENTLY AND UNEQUIVOCALLY ANSWERED BY THE UNITED STATES COURTS OF APPEALS FOR EACH CIRCUIT WHERE THE ISSUE HAS BEEN RAISED.

Whether damages are collectible under 42 U.S.C. § 1983 against a private party who follows a statutory real estate attachment procedure presumed to be constitutional is a question which has arisen several times over the past several years. The petitioners claim that the lack of a definitive decision on this issue has given rise to uncertainty and conflicting rationales in the various court's application of 42 U.S.C. § 1983 (Petition, p. 6), yet no amount of strained semantics should obscure the basic fact that Federal Courts have uniformly rejected the notion that damages will lie in a civil rights action against one who in good faith followed a statutory procedure presumed to be constitutional. See *Kacher v. Pittsburgh National Bank*, 545 F. 2d 842 (3d Cir. 1976); *Tucker v. Maher*, 497 F. 2d 1309 (2d Cir. 1974), cert. denied 419 U.S. 997 (1974); *Rios v. Cessna Finance Corporation*, 488 F. 2d 25 (10th Cir. 1973); *G. H. McShane Co., Inc. v. McFadden*, 554 F. 2d 111 (3d Cir. 1977), cert. denied 434 U.S. 857 (1977). It will be noted that in two of the cases cited immediately above, where the factual situations presented and the issues raised were almost identical to the present case, certiorari was denied by this Court.

The petitioners state that the decisions "cited in the opinion of the Court of Appeals are indicative of the lack of any consistent standard regarding liability under § 1983" (Petition, p. 7). A review of these decisions discloses, however, that the petitioners have failed to appreciate the steady development of rules in this sensitive area, which are both consistent with Supreme Court jurisprudence and fundamentally fair. The petitioners do recognize that in *Kacher v. Pittsburgh National Bank*, supra at 847, the court denied liability because the defendant's actions lacked the "essential ingredient of tort liability at common law." The petitioners acknowledge that *G. H. McShane Co., Inc. v. McFadden*, supra, is in accord with this formula, yet they see fit to distinguish *Kacher v. Maher*, supra at 1315 where "the court required a showing of 'improper motive'" (Petition p. 7).

A closer reading of the *Tucker* decision indicates that the petitioners have failed to sense the identity of approach which characterizes all three of these opinions as well as the opinion below. In the *Tucker* decision, the court conducted a review of relevant authority which clearly indicated that "some nexus does exist between the nebulous § 1983 tort and its conventional common law counterpart." *Tucker v. Maher*, supra at 1314. This guiding principle was initially made clear by Mr. Justice Douglas in *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492 (1961), where he stated that the statute should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." The Second Circuit Court then went on to apply this principle to the instant facts by adopting the language of Judge Goldberg in *Whirl v. Kern*, 407 F. 2d 781, 787-788 (5th Cir. 1969), cert. denied 396 U.S. 901, 90 S. Ct. 210, 24 L. Ed. 2d 177 (1969):

"when an essential element of the wrong itself under well established principles of tort law includes the demonstration of an improper motive as in malicious prosecution, . . . then such principle becomes a part of sec. 1983."

Two years after the *Tucker* opinion the Third Circuit in *Kacher v. Pittsburg National Bank*, supra at p. 847, adopted an indistinguishable approach by stating, "As the plaintiff in a tort action for malicious prosecution must establish improper motive on the part of the defendant, so must a plaintiff asserting the analogous section 1983 claim." Then, one year later the Third Circuit, in *G. H. McShane Co., Inc. v. McFadden*, supra at 114, affirmed the continued viability of the principles stated in *Kacher* by holding that under facts such as those in the present case, "the plaintiff would have to allege and prove wrongful motive on the part of the creditor in order to hold him answerable in damages."

The petitioners also contend that the earliest United States Court of Appeals case to treat the issue, *Rios v. Cessna Finance Corporation*, supra, contributes to their finding of confusion in this area. At page 7 of the Petition it is argued that the Tenth Circuit Court would not allow recovery in any circumstances. Yet analysis of the opinion reveals that the court reached no such finding since it is expressly stated that "although Rios now questions the good faith of Cessna Finance in proceeding under the replevin laws of New Mexico, we believe no factual issue on the question exists." *Rios v. Cessna Finance Corporation*, supra at 28.

The conclusion of this crucial aspect of the petitioners' argument is that "None of the cases cited sets forth any clear or uniform guideline or standard for imposition of § 1983 monetary liability, nor does any of them support the conclusion of the Court of Appeals that a plaintiff

must establish 'malice'" (Petition, p. 7). Respondents strongly urge that the petitioners have conducted a superficial and manifestly incorrect review of these opinions, and their finding of confusion in this area is without basis. The cases discussed above and cited in the opinion below in fact provide a set of standards which are uniform in their holding that there is no civil rights cause of action for damages in cases such as the present one, without a showing that the defendant's actions were wrongful.

II. THE COURTS BELOW WERE CORRECT IN THEIR DENIAL OF THE PETITIONERS' CLAIM FOR MONEY DAMAGES UNDER 42 U.S.C. § 1983.

A. The petitioners commence their analysis of the Court of Appeals' purported error with the observation that, "[t]he holding of the Court of Appeals goes well beyond any of the cases cited therein" (Petition, p. 7). There is no justification, the petitioners say, for granting either absolute or qualified immunity to a private citizen who acts in accordance with a statute which ultimately may be held to be unconstitutional. They argue that such a person must be distinguished from a public servant and that this is "the distinction which apparently the Court of Appeals and the District Court did not recognize" (Petition, p. 9). Again respondents urge that the petitioners have shown little grasp of the Court of Appeals opinion and in this instance their attempt to invent inconsistencies has no textual grounds.

The petitioners support their analysis of the Court of Appeals' supposed error by focusing attention on that court's reliance on *Rios v. Cessna Finance Corporation*, supra, and *Tucker v. Maher*, supra. The *Rios* court cited the case *Baxter v. Birkins*, 311 F. Supp. 222 (D. Colo. 1970) as authority for its holding. *Birkins* did involve a

public official, while the *Tucker* case involved multiple defendants, some of whom were public officials. For these reasons, the petitioners apparently conclude that the Court of Appeals has granted "either absolute or qualified immunity" to private citizens who act in accordance with statutes which are later rendered unconstitutional. What the petitioners fail to appreciate is that *Rios* and *Tucker* involve private party defendants, and in each decision the court's primary focus is upon the rights of such private citizens. There is mention in *Rios* of *Birkin*, a case dealing with a public official, but it should be noted that the Court of Appeals in the opinion below did not even cite this decision.

The petitioners' characterization of *Tucker v. Maher*, supra, as demonstrative of the Court of Appeals' misunderstanding of relevant precedent is equally perplexing. For this decision, delivered by the United States Court of Appeals for the Second Circuit, contains perhaps the most compelling judicial explanation why civil rights damages should be available against a private individual who acted in accordance with a then constitutional statute only in a narrowly defined set of circumstances. Constitutional law, Judge Mulligan observed, "particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. . . . [R]ecent history . . . should convincingly indicate that the role of the prophet is precarious." *Tucker v. Maher*, supra at 1315.

Private citizens and counsel who represent them should be able to, and have a right to, rely on statutory law which has been neither repealed nor replaced. As the court states, the role of the attorney would be particularly precarious if such good faith reliance were deemed insufficient:

"If counsel had failed to file the lien to protect his client, he might well be exposed to personal liability. State legislation is under increasing constitutional attack but until the assault is successful, attorneys should be entitled to rely upon the presumption of constitutionality." *Tucker v. Maher*, supra at 1316.

The *Tucker* court concluded that dependence upon a statutory scheme which is subsequently termed unconstitutional is not to be equated with the malevolent intent basic to the tort of malicious prosecution. In light of this authority, as well as its confirmation in the *Kacher* and *McShane* opinions, the Court of Appeals concluded:

"a plaintiff alleging a violation of his civil rights through a wrongful invocation of legal proceedings against him must, to obtain damages, prove more than the use of an attachment procedure which, although under attack in the courts as violative of recent Supreme Court interpretations of due process, had not yet been declared invalid" (A. 10a-11a).

What the plaintiff must prove in such cases is "some kind of ulterior motive on the part of the defendant or other evidence of wrongfulness sufficient to establish malice" (A. 11a). The petitioners argue that such a holding goes well beyond the holding of *Tucker* or any of the cases which followed. Respondents respectfully submit that this argument is completely without merit and displays a profound lack of understanding of recent developments in this area of substantive law.

B. As another ground of error, the petitioners contend that under the principles set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), full retroactive application of *Bay State Harness Horse Racing and Breeding Association, Inc. v. PPG In-*

dustries, Inc., 365 F. Supp. 1299 (D. Mass. 1973) (wherein the Massachusetts pre-judgment real estate attachment procedure was termed unconstitutional) applies to the petitioners' action. The petitioners acknowledge that the initial inquiry required by *Chevron Oil* is "whether the party urging nonretroactivity should have relied upon 'clear past precedent'" (Petition, p. 10). The result in *Bay State*, the petitioners assert, did not overrule past precedent, but rather had been clearly foreshadowed in *Schneider v. Margosian*, 349 F. Supp. 741 (D. Mass. 1972), wherein the Massachusetts statute providing for ex-parte pre-judgment attachment by way of trustee process had been declared unconstitutional. In fact, the petitioners argue, any distinction between the constitutional infirmity of the trustee process statute and the real estate attachment statute "is negligible" (Petition, p. 4).

Closer analysis of *Bay State* and *Schneider* indicates that while the opinions share certain concerns, they are focused on specific civil rights so substantially different, their distinction can hardly be designated negligible. In *Schneider*, Judge Garrity noted that the Massachusetts trustee process statute under attack authorized the garnishment of wages. Thus, it was found that *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), was directly on point. Judge Garrity observed that the Supreme Court's opinion had noted that "garnishment visits special hardship on the poor and asserted that wages are a special form of property, even a temporary loss of which could 'drive a wage earning family to the wall.'" *Schneider v. Margosian*, supra at 744.

Bay State does not deal with trustee procedure, nor with any of the special problems such a concern entails. Rather it is concerned with real estate attachment proce-

cedure, and while it involves some similar due process issues, it also deals with such unique issues as the importance of real estate attachments in securing quasi in rem jurisdiction. Yet the petitioners conclude that "[g]iven the trend signalled by *Schneider* and other procedural due process cases being decided at that time, the respondents could not have reasonably relied on the constitutionality of the attachment statute" (Petition, p. 10).

Note should be taken at this point that the other due process cases being decided at that time did not provide such an unequivocal foreshadowing of future developments as the petitioners suggest. In fact as the court notes in *Bay State*, supra at 1305, in *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971) a United States District Court had "held constitutional Connecticut real estate attachment statutes similar in almost every respect to the Massachusetts statutes." In view of the unanimous holding that neither public official nor private party should be held to the impossible duty of predicting the future course of constitutional law, it seems indisputable that the petitioners' attempt to apply *Bay State* retroactively should be unsuccessful.

Conclusion.

For the reasons stated above it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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